

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

To Be Argued By
Robert B. Fiske, Jr.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

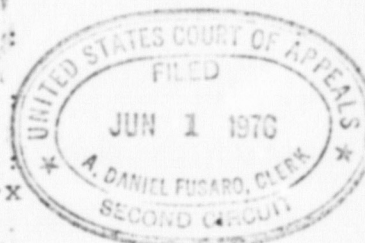
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UNITED STATES OF AMERICA,

- v -

ALBERTO MEJIAS, MARIO NAVAS, ESTELLA
NAVAS, HENRY CIFUENTES-ROJAS, JOSE
RAMIREZ-RIVERA, MANUEL FRANCISCO
PADILLA MARTINEZ, and FRANCISCO CADENA,

Defendants-Appellants.
-----x

76-1236
B
p/s
Docket No. 76-1236



SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This revision of the second point of the Brief for the United States of America filed on Friday, May 28, 1976 is being submitted in order to clarify the factual basis for the argument that any delay in the commencement of the trial beyond the ninety day period is attributable to the "fault" of the defendants and their counsel.*

* Because of the time pressures under which the Government's brief was prepared, compounded by the fact that the Assistant in charge of the case was actually on trial in this case while the brief was being prepared, the facts were not presented adequately in the original brief. This brief is intended to correct and amplify the factual basis for Point II of the Brief for the United States of America.

A

POINT II

THE RELEASE PROVISIONS BY THEIR TERMS DO NOT APPLY TO THE APPELLANTS

The provisions for release of detained defendants do not apply to the appellants even if the time for pre-trial motions is not excluded. The release provisions, 18 U.S.C. § 3164 and Rule 4 of the Interim Plan, both apply only to a "defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney" The release provisions do not apply to these appellants because it was their "fault" that the trial had not commenced. Fault, in this context, is not, as Judge Carter appears to suggest (Opinion at 4, n. 5), irresponsibility or incompetence. It was the defendants' motions and their dilatory making of these motions that delayed the trial.

Indictment 76 Cr. 164 was filed on February 19, 1976. The arraignment in Part I took place on February 23, 1976 and not guilty pleas were entered for all defendants. Although Rule 8(b) of the Southern District Rules for the Administration of the Civil and Criminal Calendars requires that motions be made within ten days after the entry of a plea, no motions were made within the ten days and no continuance of the time for making motions was sought or granted. In fact no motions were made before March 24, 1976 when the defendant Padilla filed a Notice of Motion for dismissal based on failure to provide a speedy trial.

At a pretrial conference on March 30, 1976 Judge Carter instructed counsel to file motions by April 1st and specifically said that motions must be accompanied by supporting memoranda. Nonetheless, defense counsel filed most of their motions after April 1st and in most instances without supporting papers.*

The defendants did file a large number of motions, including the following: (1) motions to dismiss for deprivation of a speedy trial (Padilla, Estella Navas, Rojas); (2) motions to suppress evidence seized from and statements made by Estella Navas when she was arrested and to suppress evidence seized from her apartment at 61-20 Grand Central Parkway, Queens, New York; (3) motion to suppress evidence seized from an apartment at 327 West 30th Street, New York, New York (Rojas); (4) motion to suppress evidence seized from an apartment at 445 West 48th Street, New York, New York (Mejiás); (5) motions to suppress evidence obtained as a result of electronic surveillance (Padilla, Estella Navas,

* Rule 9(b) of the General Rules of the Southern District Rules requires the filing of a supporting memorandum along with any motion. "Failure to comply may be deemed sufficient cause for the denial of the motion. . . ." Similarly, this Court has held that in order to obtain a hearing, a motion must be accompanied by an affidavit reciting personal knowledge of the facts in question and that an affidavit of defense counsel on information and belief is inadequate. United States v. Gillette 383 F.2d 843, 848 (2d Cir. 1967).

Mario Navas, Rojas); (6) motion for a severance (Rojas); (7) motion to dismiss on the grounds of double jeopardy (Rojas); (8) motions for bill of particulars, discovery and inspection (Padilla and Rojas).

None of these motions was made within the ten day period established by Southern District Rule 8(b) nor by the April 1st deadline set by Judge Carter. Very few of the motions were supported by memoranda of law. All the motions were fatally defective because no affidavit based on personal knowledge was filed until Friday, May 14, 1976 when Mejias filed an affidavit in support of his motion to suppress evidence seized from his apartment at 445 West 48th Street. On the very next court day, Monday, May 17th, Judge Carter commenced a hearing on this motion. It was this hearing that delayed the commencement of the trial beyond the ninetieth day.

These facts demonstrate that this trial was delayed because of the fault of the defendants and their counsel. None of the pretrial motions was made or perfected in a timely manner. The affidavit based on personal knowledge in support of the motion that caused the delay in beginning the trial was filed on Friday, May 14th, and the hearing on that motion began on Monday, May 17th. We think these are the sort of circumstances that the Ninth Circuit had in mind in United States v.

Tirasso, supra, Dkt. No. 76-1571 (March 25, 1976), when it said, "The reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel." (Issuance # 12, Administrative Office of the United States Courts, March 30, 1976, p. 2, emphasis added). Because the delay in this case was occasioned by the defendants and their counsel, the defendants are not entitled to be released from custody.

If the Court rejects the Government's position on fault and equates fault with incompetence, irresponsibility or planned delay, a new and extraordinarily difficult determination will be required in order to determine whose fault has caused the delay. Whenever a motion is made prior to trial, and particularly toward the end of the 90-day period, it will be necessary to make a determination of counsel's good faith and whether the motion is made for purposes of delay. This standard is simply unworkable.*

* In addition, it can be said that the Act and the Interim Plan never applied to these appellants because their trial had commenced within ninety days. The trial in this case included the suppression hearing that began on the eighty-eighth day. We emphasize that this is not a case where the Government had been dilatory in responding to defense motions or where the Court had the motions under advisement at the conclusion of the ninety day period. The Court actually was taking evidence in connection with this trial on the eighty-eighth day, and the trial may be considered to have commenced at that point.

CONCLUSION

The decision of the District Court denying appellants' motions for release from custody pending trial should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

LAWRENCE IASON, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of June 1976, he served a copy of the within Supplemental Brief for the United States by placing the same in properly postpaid franked envelopes addressed:

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And deponent further says that he sealed the said envelopes and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence Iason
LAWRENCE IASON
Assistant United States Attorney

Sworn to before me this
1st day of June, 1976

Jeanette Ann Grayeb
Notary Public

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-134175
Qualified in Kings County
Commission Expires March 30, 1977